IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 346 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KHEMABHAI ARJUNBHAI RAJPUT - APPELLANT
(Orig. Accused)

Versus

STATE OF GUJARAT - RESPONDENT

Appearance:
MR G RAMAKRISHNAN for Appellant
MR KG SHETH, APP for Respondent

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE SHARAD D.DAVE

Date of decision: 13/08/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE R.K.ABICHANDANI for the Court)

1. The appellant - accused challenges the judgement and order dated 7th April 1992 of the learned Additional Sessions Judge, Banaskantha, at Palanpur in Sessions Case No. 156 of 1990, convicting him for the offence under section 302 of the Indian Penal Code and sentencing him to imprisonment for life and payment of fine of Rs.1,000=00, in default of which, to undergo further rigorous imprisonment for a period of six months and also convicting him for the offence under section 135 of the Bombay Police Act and sentencing him to undergo rigorous imprisonment for a period of three months and pay a fine of Rs.100=00, in default to undergo further rigorous imprisonment for one month.

2. The prosecution version was that the accused Khemabhai Arjunbhai Rajput was having a grievance against Chandaji Samtaji, because, he was suspecting that Chandaji had instigated his wife Amri to go and stay with her parents and not to return to the accused. Chandaji had made an application exh.54 to the police sub inspector, Suigam to take precautionary measures against the accused forcibly taking his wife Amri from her parent's house and beating her. That application was given on 27-8-1989. It appears that it was compromised as Chandaji did not pursue it by stating that the question of future of Amri was involved. The P.S.I. filed the application by his endorsement dated 10-9-1989 at exh.55. Necessary entry was made in the Miscellaneous Applications Register exh.56 showing that the parties had settled the dispute and the application of Chandaji was filed. According to the prosecution, the accused, however, continued to bear a grudge against Chandaji since Amri was not returning to his house. On 11th September 1989, in the evening at about 5.30 p.m., when Chandaji was passing on the road after purchasing vegetables from the bazar of Suigam for going towards his "vada" and came near the cattle pond, the accused suddenly emerged from behind a cabin with an iron-shod stick in his hand, ran towards Chandaji and gave him two blows with the lathi on his head, as a result of which, Chandaji fell down. He then gave him a further blow on his right leg causing fracture. The first two blows on the head had also caused fracture in his skull. There were, according to the prosecution, three eye witnesses, Bhuraji, Laxmanji and Vanabhai who had witnessed the incident. Chandaji was taken in a bullock-cart to the police station, where he lodged his FIR exh.45. He was

then taken to the hospital where Dr. A.H. Acharya recorded his dying declaration exh.11. After giving him some treatment, he was advised to be taken to the Civil Hospital, Palanpur. Chandaji, however, died on his way to the hospital and he was, therefore, brought back to Suigam Hospital, where the post mortem examination of his body was done, as per the post mortem report exh.50.

3. The defence of the accused is of total denial. The trial Court on the basis of the evidence on record, found that the prosecution has proved beyond reasonable doubt that the accused had intentionally caused death of Chandaji Samtaji by causing him injuries on his head by giving two stick blows and by giving him a stick blow fracturing his right leg and had committed an offence under section 302 of the Indian Penal Code. It was held that the accused also committed the offence under section 135 of the Bombay Police Act by violating the notification prohibiting carrying of arms including a stick in the public.

4. The learned counsel for the appellant - accused contended that, having regard to the parallel nature of injuries appearing on the head of Chandaji, it cannot be said that two stick blows were given on his head by the assailant and therefore, the evidence of the so called eye witnesses cannot be relied upon since they had deposed to the fact that two blows were given on the head of Chandaji by the accused. It was submitted that, as per the medical version, it was not possible to bring about such two parallel injuries by two separate blows, and therefore, in view of the discrepancy between the ocular evidence and the medical expert's opinion, the Court should lean in favour of the accused and give him benefit of doubt. The learned counsel further argued that the so called eye witnesses could not have seen the incident from the place where they were sitting. It was submitted that the shop in which Bhuraji and Laxmanji were sitting was nearly 200 feet away from the scene of offence, while witness Vanabhai could not have seen the incident, because, there was a hedge near his residential house which was 47 feet away, as per the map, from the place of offence. It was also contended that, from the deposition of Vanabhai, it appeared that Chandaji was not removed from the bullock-cart in which he was carried to the hospital, and that according to Vanabhai, the doctor had not made any inquiry from him in his presence and therefore, it was very doubtful whether the doctor had recorded his dying declaration exh.11. It was submitted that if such dying declaration were recorded by the doctor, this witness would have known about it. It was

also submitted that, with such severe blows on the head which resulted in a fracture in the skull and damaged the brain, it was not possible for Chandaji to have remained conscious so as to lodge the complaint exh.45 or to give a dying declaration exh.11. It was finally contended that, having regard to the disputes between the parties, it should be inferred that the accused might have acted under grave and sudden provocation and caused the death of Chandaji. It was submitted that he had justifiable grievance that his wife Amri was not being allowed to return to his house at the instance of Chandaji, and that Chandaji was continuing to cultivate one-half of the land belonging to him though he was required to return it back to them. It was submitted that this aspect of land dispute was borne out from Amri's evidence.

5. The learned Additional Public Prosecutor strongly contended that, from the seat of injury and the nature of the weapon used, which was a stick having thick iron rings around it, and from the manner in which the offence was committed, namely, that the accused was hiding behind the cabin and waiting for Chandaji to pass by the road and as soon as he passed, he pounced on him, giving severe blows on his head and leg, it becomes absolutely clear that the accused intended to cause death of Chandaji. It was submitted that there was no scope for invoking exception 1 to section 300 of the Indian Penal Code in this case, because, the past disputes were resolved since Chandaji had not pursued his complaint which was filed as per the endorsement of the P.S.I. at exh.55. Moreover, that incident had occurred more than three months prior to the present occurrence. Therefore, there was no grave or sudden provocation given to the accused for acting in this manner. The facts on the contrary suggested that the accused had a motive for the crime and that he had planned the attack by hiding himself behind the cabin and bringing an iron-shod stick by which he gave fatal blows on the head of Chandaji and even after Chandaji fell down, gave him a further severe blow on his right leg, which caused fracture. The learned counsel, therefore, submitted that the reasoning of the trial Court for reaching the findings against the accused was based on the evidence on record which clearly pointed towards the guilt of the accused. It was submitted that all the three eye witnesses were natural witnesses and they had no enmity against the accused and therefore, there was no reason to discard their version.

6. The incident occurred around 5.30 p.m. on 10-11-1989 at Suigam. Map exh.47 shows that the incident took place in the middle of the road. That spot was

about 190 feet away from the fair price shop in which Bhuraji and Laxmanji were working and 47 feet away from the residence of Vanaji Manji. It was a spot near a cattle pond adjoining which there is a cabin and by the side of which, there is the panchayat office. The road from the village emerges on this road. According to the prosecution witnesses, Chandaji was coming towards the spot after having purchased vegetables and was proceeding towards his "vada". When the attack took place, Bhuraji, Laxmanji and Vanabhai had, according to the prosecution, seen the incident.

7. Bhuraji, PW-3, in his deposition exh.19 has stated that, at the relevant time, he was sitting near the southern door of his fair price shop, from where it was possible to see the place of the incident. He stated that the entire area between the door of their shop and the place where the incident took place, was an open space and therefore, it was possible for him to see the incident. The incident had occurred about 5 to 10 feet away from the cattle pond. He has stated that Laxmanbhai who was working in his fair price shop was also with him. This witness knew the deceased as well as the accused. The incident occurred at about 5.30 p.m. and he and Laxmanbhai were at that time sitting near the southern door of their fair price shop. At that time, Chandaji was coming from the bazar side and when he came near the cattle pond, the accused emerged from behind the wooden cabin which was near the cattle pond. The accused was having a stick in his hands. He had hidden behind that cabin. When the accused saw Chandaji, he ran towards him and straightaway gave two stick blows on the head of Chandaji. On seeing this, he and Laxman started running towards the spot. As a result of the blows given to him, Chandaji had fallen down. At that time, Vanaji Manji and Pathuji Mulji were also running towards the spot. Before all of them could reach the spot, the accused had given one more stick blow on the right leg of Chandaji and had thereafter run away with his stick. Chandaji was bleeding from his head and leg. They therefore called a bullock-cart and Chandaji was taken to the police station, where he lodged his complaint. Thereafter, he was immediately taken to the hospital. After he was given some treatment, he was advised to be taken to Tharad. Thereafter, this witness went home and Chandaji was taken to Tharad. He later on came to know that Chandaji had died on the way to Tharad. In his cross-examination, he has reiterated that he had seen the accused giving two stick blows on the head of Chandaji after he emerged from behind the cabin. According to him, when he saw the accused coming from behind the

cabin, it had occurred to him that the accused was hiding behind the cabin. He has stated that, as the accused belong to their village, he had known him and therefore, could identify him. He has denied the suggestion that it was not possible to see the cabin from his shop and has reiterated that, if any person hidden behind the cabin comes out, it was possible to see him from his shop. He has denied the suggestion that the accused has acted on a sudden provocation or that Chandaji had quarreled with him. There is absolutely no valid reason to doubt the deposition of this witness who has asserted that he had seen the incident in which the accused gave two stick blows on the head of Chandaji and after he fell down, he gave him a stick blow on his right leg, and thereafter, Chandaji was first taken to the police station, where he lodged his complaint exh.45, and then to the hospital for treatment.

8. Laxman, who was working in the shop of Bhuraji as a clerk and was sitting with Bhuraji near the southern door of the shop, has deposed at exh.23 stating that the incident had occurred around 5.30 p.m. when Chandaji was coming from the bazar side with vegetables and when he came near the cattle pond, the accused who was hiding behind the cabin near the cattle pond, had emerged with stick and had given two stick blows on the head of Chandaji who started shouting and fell down. He has stated that he and Bhuraji started running in that direction and at that time, Panthuji Mulji and Vana Manji Harijan were also running towards the spot. At that time, this witness saw that the accused gave a further stick blow on the right leg of Chandaji. He had seen Chandaji bleeding from his head and leg injuries. He has stated that the bone from the leg had protruded. He has then spoken about Chandaji being taken in a bullock-cart to the police station, where Chandaji lodged his FIR exh.45. In the cross-examination, this witness has denied the suggestion that the distance between his shop and the cattle pond was 300 feet and has stated that it was only 125 feet. He has asserted again that he had seen the accused giving two stick blows on the head of Chandaji. According to him, immediately after giving first blow with his stick on the head of Chandaji, the accused had given the other stick blow on his head at the same time, which also he had seen. He has stated that the accused had run away with the stick. There is nothing brought out in his cross-examination which can create any doubt whatsoever over his version.

9. The third eye-witness Vanabhai who was a close-by resident has in his deposition exh.25 stated that he was

sitting on the `otla' of his house at the time of the incident and he had seen that when Chandaji came from the bazar side and reached near the cattle pond, the accused who was standing by the side of the cabin, had run with a stick towards Chandaji and gave two stick blows on his head. This witness, therefore, started running in that direction. At that time, when Chandaji was falling down, the accused gave him another stick blow on his right leg, which also this witness had seen. Thereafter, the accused ran away with the stick. He stated that Chandaji was bleeding from his injuries and there was a blood-pool formed on the ground where he was injured. Chandaji was then taken in a bullock-cart to the police station, where his complaint was recorded and he had put his thumb mark in it and was thereafter taken to Suigam Hospital. His relatives had come and had taken him in a jeep to Tharad Hospital. At 10 O'clock night, he came to know that Chandaji had died. This witness had shown the scene of offence to the police. In his cross-examination, he maintained that he had seen the incident and has denied the suggestion that he was deposing under a threat of other witnesses, because, he was a schedule caste person. He has stated that doctor had not made any inquiry from Chandaji. On this part of evidence, it was tried to be contended that the doctor must not have recorded the dying declaration exh.11. There is no substance in this contention, because, it has come in evidence that the dying declaration was recorded by the doctor, when no one else present near Chandaji. Obviously therefore, this witness could not have known about what transpired between the medical expert and Chandaji when his statement was recorded. This witness also appears to be a natural and reliable witness and he fully supports the prosecution version.

10. The deposition of the three eye witnesses cannot be brushed aside on any imaginary ground. There was no indication of any quarrel or sudden provocation. It was a cold-blooded and calculated attack by the accused, who was hiding near the cabin with iron-shod stick, which was later on recovered at the instance of the accused under the discovery panchnama exh.40, which is proved in the deposition of prosecution witness Ganeshji exh.39. That iron-shod stick was forwarded for analysis to the Forensic Science Laboratory and as per the report of the chemical analyzer & serologist at exh. 51 and 52, it was found that there was human blood on the iron rings of the stick, which was of `O' group, which group was of the blood of the deceased, as was ascertained from his blood stained clothes which were also forwarded for analysis as reflected from the chemical analyzer & serologist reports

exh.51 and 52. The oral version of three eye witnesses itself is sufficient to hold the accused guilty, but in this case, over and above the reliable evidence of the eye witnesses, there is also circumstantial evidence in the form of the discovery of the stick being made at the instance of the accused and the human blood stains of `O' group having been found thereon, which clearly connected the weapon with the assault which was committed on the deceased.

11. There is hardly any substance in the contention that there is conflict between the medical evidence and the ocular version, on the ground that two parallel injuries of the nature which were found on the head of the deceased could not have been caused by giving two separate blows. If we examine the medical evidence carefully, there is no such conflict. Dr. Acharya in his deposition has stated that he had noticed the following injuries which are also described in the post mortem notes exh.15 of Chandaji.

"[1] Compound fracture - right tibia and right fibula (Right leg) at upper 1/3rd level of leg with such bone pieces transversely.

[2] Two parallel wounds C.L.W. on head on left side 10 c.m. above left ears and 15 c.m. above the left eye brow 6 c.m. x 3 c.m. with a small 0.5 c.m. skin slit in between two with blood clots in wound. Injury may have been caused within 24 hours before the start of P.M. Wound edges are rough.

[3] Fracture right leg (right tibia and right fibula with upper 1/3rd level of leg

[4] All injury are ante mortem"

11.1 The internal injuries corresponding to the above injuries on head are described in the column 18 of the post mortem notes, as under :

"Head injury 10 c.m. above left ear and 15 c.m. above left eye brow. Skin teared off by zigzag way on edges and tissue are compressed. Fracture of skull bone on left side near biparital occiputo junction on left side 5 c.m. x 2 c.m. inner and outer bone are deepened inside due to

fracture sub dural hematoma on posterior aspect of brain. Brain tissue are pails."

11.2 Dr. Acharya has said that these injuries are possible by the stick muddamal article - 9. On seeing that stick, he stated that if the blow is given with the iron-shod part of the stick, such injuries are possible. He has also stated that he had recorded the dying declaration exh.11 of Chandaji. He had asserted that Chandaji was conscious at that time and was in a position to speak, and that he was giving answers after understanding what this doctor was asking him when he recorded his dying declaration exh.11. In his cross-examination, he has reiterated that the patient was in full senses and was understanding whatever questions were put to him and giving appropriate answers. He has stated in paragraph 18 of his deposition that if a blow given on the head, rebounds and again hits on the head, then the parallel injuries, which occurred on the head of Chandaji, were possible.

12. The defence has examined Dr. Deshmukh at exh.64., who true to his profession, he has spoken the truth and denied the suggestion in paragraph 19 of his examination in-chief that these injuries were not possible by the muddamal stick and has asserted that such injuries could be caused by the muddamal stick. He has admitted in the cross-examination that if two consecutive stick blows are given on the head with the muddamal stick, they would cause the injuries described in the post mortem notes which were sufficient in the ordinary course of nature to cause death. It is interesting to note that, in his examination in-chief, in reply to question No.15, he stated that he was not in a position to deny the possibility of two parallel injuries being caused by the muddamal stick. He has stated that if the other blow is given on the same place, such parallel injuries are possible.

13. There is, therefore, absolutely no conflict between the medical evidence and the ocular evidence. The evidence of three eye witnesses clearly establishes that two stick blows were given to Chandaji by the accused on his head, which caused two injuries on his head with a fracture, and, the third stick blow which he gave on the right leg of Chandaji, fractured his right leg. The nature of injuries shows that the blows were given with great force with the iron-shod stick, which from its description, appears to be a very heavy stick. Even without resorting to the dying declaration, we are fully satisfied from the oral evidence on record,

supported by the medical evidence and the circumstantial evidence on record that the accused alone had committed the crime, and that he had given the blows with an intention of causing death of Chandaji, who died as a result of the injuries caused by the accused to him.

14. The dying declaration exh.11 is also a re-assuring feature of the case. The medical expert had no personal interest in concocting any dying declaration. In fact, we appreciate his having recorded this dying declaration at the time when Chandaji was brought to him. He had ascertained that Chandaji was in full senses and was able to understand the questions and was in a position to answer. In the dying declaration, Chandaji had in terms stated that he was coming from the village after buying vegetables and the accused -Khemabhai Arjunbhai Rajput had given stick blows to him on his head and leg. He also stated that there was an enmity between them. He further stated that the accused had attacked him near the cattle pond. It is recorded in the dying declaration that he he had stated that he was not giving the statement under any pressure and that he was in his full senses. The medical expert had also endorsed that the accused was in his full senses and that he was recording the statement, because, the condition of the patient appeared to be precarious. It is also endorsed that the statement of Chandaji was recorded while he was alone and nobody else was present. The left thumb impression of Chandaji was taken below his statement. We find this dying declaration to be completely reliable, coming from a valid source, and inspiring confidence. Even if there were no other evidence, merely on the basis of this dying declaration, we would have found the accused guilty. However, as pointed out above, even without resorting to the dying declaration, the oral evidence supported by the medical evidence as well as the circumstantial evidence, is itself sufficient to hold the accused guilty of the offence with which he has been charged. The dying declaration fortifies that conclusion.

15. In the above view of the matter, we find ourselves in complete agreement with the reasoning and findings of the learned trial Judge and therefore, dismiss this appeal.

AUGUST 13, 2001 [R.K.ABICHANDANI, J.]

[SHARAD D. DAVE, J.]

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